Supreme Court, U.S.
FILED
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141 (1) 09-377

No.

In the Supreme Court of the United States

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

LAUREL BAYE HEALTHCARE OF LAKE LANIER, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether Section 3(b) of the National Labor Relations Act, 29 U.S.C. 153(b), authorizes the National Labor Relations Board to act when only two of its five positions are filled, if the Board has previously delegated its full powers to a three-member group of the Board that includes the two remaining members.

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PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the National Labor Relations Board, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-15a) is reported at 564 F.3d 469. The decision and order of the National Labor Relations Board (App., *infra*, 22a-44a) are reported at 352 N.L.R.B. 179.

JURISDICTION

The judgment of the court of appeals was entered on May 1, 2009. A petition for rehearing was denied on July 1, 2009 (App., *infra*, 18a-21a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 3(b) of the National Labor Relations Act provides in relevant part:

> The Board is authorized to delegate to any group of three or more members any or all of the powers which it may itself exercise. * * * A vacancy in the Board shall not impair the right of the remaining members to exercise all of the powers of the Board, and three members of the Board shall, at all times, constitute a quorum of the Board, except that two members shall constitute a quorum of any group designated pursuant to the first sentence hereof.

29 U.S.C. 153(b).

STATEMENT

1. In enacting the National Labor Relations Act (NLRA), Congress sought through "the promotion of industrial peace to remove obstructions to the free flow of commerce as defined in the Act." *NLRB* v. *Fansteel Metallurgical Corp.*, 306 U.S. 240, 257-258 (1939); see 29 U.S.C. 151. To that end, the NLRA provides mechanisms to resolve questions concerning union representation peacefully and expeditiously, see 29 U.S.C. 159, and to remedy and prevent unfair labor practices, see 29 U.S.C. 158, 160.

Congress "confide[d] primary interpretation and application of [the NLRA] to a specific and specially constituted tribunal," the National Labor Relations Board (NLRB or Board). *Garner* v. *Teamsters, Local Union No. 776*, 346 U.S. 485, 489-490 (1953); 29 U.S.C. 153, 154, 159, 160. As originally constituted, the Board comprised three members, and the vacancy and quorum provisions of the Act provided: "A vacancy in the Board

shall not impair the right of the remaining members to exercise all the powers of the Board, and two members of the Board shall, at all times, constitute a quorum." Act of July 5, 1935, ch. 372, § 3(b), 49 Stat. 451.[1]

In 1947, Congress enacted the "Taft-Hartley Act," which enlarged the Board's unfair labor practice jurisdiction and amended Section 3(a) of the NLRA, 29 U.S.C. 153(a), to increase the Board's size from three to five members. See Labor-Relations Management Act, 1947, ch. 120, § 101, 61 Stat. 139. Congress also amended Section 3(b) to authorize the Board "to delegate to any group of three or more members any or all of the powers which it may itself exercise," and amended the quorum requirements to provide that "three members of the Board shall, at all times, constitute a quorum of the Board, except that two members shall constitute a quorum of any group designated pursuant to the first sentence hereof [respecting delegation]." *Ibid.* Since 1947, the overwhelming majority of the Board's decisions have been issued by three-member groups constituted pursuant to the Board's Section 3(b) delegation authority.[2]

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[1] Pursuant to that two-member quorum provision, the original Board, from 1935 to 1947, issued 464 published decisions with only two of its three seats filled. The Board had only two members during three separate periods during that time: September 1 until September 23, 1936; August 27 until November 26, 1940; and August 28 until October 11, 1941. See *NLRB Second Annual Report* 7 (1937); *NLRB Sixth Annual Report* 7 n.1 (1942); *NLRB Seventh Annual Report* 8 n.1 (1943). Those two-member Boards issued 3 published decisions in 1936 (reported at 2 N.L.R.B. 198-240); 237 published decisions in 1940 (reported at 27 N.L.R.B. 1-1386 and 28 N.L.R.B. 1-79); and 224 published decisions in 1941 (reported at 35 N.L.R.B. 24-1334 and 36 N.L.R.B. 1-44).

[2] See *NLRB Thirteenth Annual Report* 8-9 (1949); Staff of J. Comm. on Labor-Management Relations, 80th Cong., 2d Sess., *Report Labor-*

2. In 2002, the Board solicited an opinion from the Department of Justice's Office of Legal Counsel (OLC) on the question whether the Board could continue to operate with only two members if the Board had previously delegated all of its powers to a group of three members. OLC, Department of Justice, *Quorum Requirements*, 2003 WL 24166831 (Mar. 4, 2003). Prior to that request, the Board had not issued decisions when it had only two members. *Id.* at *1. The OLC opinion concluded that, under Section 3(b), if the Board, at a time when it had at least three members, had "delegated all of its powers to a group of three members, that group could continue to issue decisions and orders as long as a quorum of two members remained." *Ibid.*

In late 2007, the Board had four members but anticipated losing two of those members imminently when their recess appointments expired at the end of the year. On December 28, 2007, the four sitting members of the Board—Members Liebman, Schaumber, Kirsanow, and Walsh—delegated all of the Board's powers to a three-member group consisting of Members Liebman, Schaumber and Kirsanow.[3] App., *infra*, 4a. After the

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Management Relations Pt. 3, at 9 (Comm. Print 1948); *1988 Oversight Hearing on the National Labor Relations Board: Hearing Before a Subcomm. of the House Comm. on Gov't Operations*, 100th Cong., 2d Sess. 44-46 (1988) (*Deciding Cases at the NLRB*, report accompanying NLRB Chairman's statement).

[3] Also on that day, the Board temporarily delegated to the General Counsel under Section 3(d) of the NLRA, 29 U.S.C. 153(d), full and final authority on behalf of the Board to initiate contempt proceedings for non-compliance with Board orders, to institute and conduct appeals to the Supreme Court, and to initiate and prosecute injunction proceedings, under Sections 10(e), (f), and (j) of the NLRA, 29 U.S.C. 160(e), (f), and (j). See Minute of Board Action (Dec. 20, 2007); NLRB Press Release, *Labor Board Temporarily Delegates Litigation Auth-*

recess appointments of Members Kirsanow and Walsh expired three days later, remaining Members Liebman and Schaumber, acting as a two-member quorum, continued to exercise the powers the Board had delegated to the three-member group.[4] Since January 1, 2008, that group, through its two-member quorum, has issued over 400 decisions.[5]

3. Respondent Laurel Baye Healthcare of Lake Lanier operates a nursing care facility for geriatric and disabled residents in Buford, Georgia. *Laurel Baye Healthcare of Lake Lanier, LLC* v. *NLRB*, 209 Fed. Appx. 345, 347 (4th Cir. 2006). In November 2004, employees of respondent elected to be represented as a collective bargaining unit by the United Food and Commercial Workers International Union, Local No. 1996 (Union). Although the Board certified the Union as the employees' bargaining representative in June 2005, respondent subsequently refused to recognize and bargain with the Union. *Ibid.* In response, based on an unfair labor practice charge filed by the Union, the Board's General Counsel issued a complaint, and the Board issued an order requiring respondent to recognize and bargain with the Union. *Laurel Baye Healthcare of*

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ority to General Counsel; Will Issue Decisions with Two Members After Members Kirsanow and Walsh Depart (Dec. 28, 2007).

[4] On July 9, 2009, the Senate received the President's nomination of Craig Becker, Mark Gaston Pearce, and Brian Hayes to be members of the National Labor Relations Board. 155 Cong. Rec. S7332 (daily ed. July 9, 2009).

[5] On May 4, 2009, it was reported that the two-member quorum of the group had issued approximately 400 decisions, published and unpublished. See BNA, 83 *Daily Labor Rep.* AA-1, at 1. The published decisions are reported in 352 N.L.R.B. (146 decisions), 353 N.L.R.B. (132 decisions), and 354 N.L.R.B. (81 decisions as of September 28, 2009).

Lake Lanier, LLC, 346 N.L.R.B. 159 (2005). The United States Court of Appeals for the Fourth Circuit later denied respondent's petition for review and granted the Board's cross-application for enforcement. *Laurel Baye*, *supra*, 209 Fed. Appx. 345.

In January 2006, the Board's Regional Director issued a consolidated complaint against respondent alleging that respondent violated its duty under Section 8(a)(1) and (5) of the NLRA, 29 U.S.C. 158(a)(1) and (5), to bargain with the Union between the time of the Union's November 2004 election and its June 2005 certification as bargaining representative. App., *infra*, 29a, 31a-32a. The complaint alleged that respondent made unilateral changes to the terms and conditions of employment for its bargaining unit employees by implementing changes in its attendance policy; dress code; health insurance carriers, premiums, and benefits; and vacation and sick leave pay benefits. *Id.* at 31a-32a. After holding a hearing, an administrative law judge (ALJ) issued a decision finding that respondent had committed the alleged unfair labor practices. *Id.* at 29a-44a. In an order dated February 29, 2008, the Board—comprised of the two sitting members acting as a quorum of the three-member group to which the Board had delegated its full authority—adopted the ALJ's findings and conclusions, and ordered respondent to bargain with the Union, rescind the unilateral changes upon request by the Union, and make the employees whole for any losses resulting from those unilateral changes. *Id.* at 22a-26a.

4. Respondent filed a petition for review of the Board's order in the United States Court of Appeals for the District of Columbia Circuit, and the Board cross-applied for enforcement of its order. App., *infra*, 1a. Respondent did not contest the substance of the Board's

unfair labor practice findings, instead challenging the authority of the two sitting Board members to issue the decision. *Id.* at 1a-2a.

The court of appeals granted the petition for review and denied the Board's cross-application for enforcement. App., *infra*, 1a-15a. The court declined to consider respondent's argument that the Board's initial delegation of authority to the three-member group was invalid because the Board knew the group would soon be acting as a two-member group. *Id.* at 6a. Instead, the court concluded that, even if the initial delegation of the Board's authority to the group was valid, the group lost its authority to act under Section 3(b) when the Board as a whole lost its three-member quorum. *Id.* at 6a-14a.

The court relied on the clause in Section 3(b) stating that "three members of the Board shall, at all times, constitute a quorum of the Board," concluding that neither the Board nor any group of the Board may act when the Board's total membership falls below three, "regardless of whether the Board's authority is delegated to a group of its members." App., *infra*, 6a-7a; 29 U.S.C. 153(b). The Court rejected the Board's argument that the subsequent statutory phrase—"except that two members shall constitute a quorum of any group designated pursuant to [Section 3(b)'s delegation provision]," 29 U.S.C. 153(b)—constituted an exception to the quorum requirement for the Board as a whole. *Id.* at 6a-8a. In the court's view, Section 3(b)'s group quorum requirement "does not eliminate the requirement that a quorum of the *Board* is three members." *Id.* at 7a. Thus, the court reasoned, "where, as here, a delegee group acts on behalf of the Board, the Board quorum requirement still must be satisfied." *Id.* at 12a (internal citation omitted). Because the Board quorum require-

ment of three members was not satisfied, the court held that the remaining two Board members could not act. The court accordingly ordered that the Board's decision "be vacated, and the case remanded for further proceedings before the Board at such time as it may once again consist of sufficient members to constitute a quorum." *Id.* at 14a-15a.

REASONS FOR GRANTING THE PETITION

The decision below is incorrect and conflicts with decisions of the Seventh, Second, and First Circuits. *New Process Steel, LP* v. *NLRB*, 564 F.3d 840 (7th Cir. 2009), petition for cert. pending, No. 08-1457 (filed May 22, 2009); *Snell Island SNF, LLC* v. *NLRB*, 568 F.3d 410 (2d Cir. 2009), petition for cert. pending, No. 09-328 (filed Sept. 11, 2009); *Northeastern Land Servs., Ltd.* v. *NLRB*, 560 F.3d 36 (1st Cir. 2009), petition for cert. pending, No. 09-213 (filed Aug. 18, 2009). Congress created the NLRB to protect the free flow of commerce by preventing and remedying unfair labor practices. In order to ensure that the Board operates efficiently and effectively, Congress amended Section 3(b) of the NLRA, 29 U.S.C. 153(b), in 1947 to allow the Board to delegate any or all of its powers to a three-member group of the Board and to allow two members of such a group to constitute a quorum of that group. Pursuant to this authority, the Board delegated its powers to a three-member group, including the two current Board members. Those members have issued more than 400 decisions as a two-member quorum of that group. The court of appeals' decision invalidating those rulings prevents the Board from enforcing the NLRA's prohibitions on unfair labor practices and conflicts with the decisions of three other courts of appeals. Moreover, because Sec-

tion 10(f) of the NLRA, 29 U.S.C. 160(f), permits any aggrieved person to seek review of a Board order in the D.C. Circuit, that court's incorrect interpretation of Section 3(b) could prevent the current Board from enforcing the NLRA throughout the country. This Court's review is therefore warranted.

However, a petition for a writ of certiorari presenting the identical question presented in this case is already pending in *New Process Steel, LP* v. *NLRB*, No. 08-1457 (filed May 22, 2009). Simultaneously with the filing of this petition, the Solicitor General, on behalf of the Board, is filing a brief in response to the certiorari petition in *New Process* agreeing that the Court should grant the petition in that case. For the reasons stated in the Board's brief in *New Process*, the decision of the court of appeals in the instant case is incorrect, conflicts with the decision of the court of appeals in *New Process* and other cases, and presents a question of recurring and sustained importance in the enforcement of the NLRA. The Court should therefore hold the Board's petition in this case pending its disposition of *New Process*.

CONCLUSION

The petition for a writ of certiorari should be held pending the Court's disposition of *New Process Steel, LP* v. *NLRB*, No. 08-1457 (filed May 22, 2009), and then should be disposed of accordingly.

Respectfully submitted.

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SEPTEMBER 2009

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 08-1162, 08-1214

LAUREL BAYE HEALTHCARE OF LAKE LANIER, INC.,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

Decided: May 1, 2009

Before: SENTELLE, Chief Judge, TATEL, Circuit Judge, and WILLIAMS, Senior Circuit Judge.

Opinion for the Court filed by Chief Judge SENTELLE.

SENTELLE, Chief Judge.

Laurel Baye Healthcare of Lake Lanier, Inc. petitions for review of an order of the National Labor Relations Board finding that Laurel Baye engaged in unlawful labor practices, and imposing a remedy. The Board cross-petitions for enforcement of the order. Unlike the typical petition for review of an NLRB order, Laurel Baye does not advance allegations of error in the Board's findings, conclusions, or remedies, but rather challenges the authority of the Board to enter the order at all, as the Board had only two members and therefore

did not meet the statutory Board quorum requirement of three members. The Board argues that because the Board itself had earlier delegated all of its authority to a three-member panel of which the two remaining Board members constituted a quorum, that quorum of the delegee panel had the authority to enter the order. Because we agree with Laurel Baye that the Board's purported order was beyond its lawful authority, we rule that the purported order is without force, deny the Board's cross-petition for enforcement, and remand the matter for further proceedings before the Board at such time as it may once again consist of sufficient members to constitute a quorum.

I. BACKGROUND

A. Legal Background

The National Labor Relations Act (NLRA), now codified as 29 U.S.C. §§ 151-169 (2008), originally provided that the National Labor Relations Board (Board) would consist of three members. *See* Act of July 5, 1935, ch. 372, § 3(a), 49 Stat. 449, 451 (amended 1947). As subsequently amended and at all times relevant to the current proceeding, the NLRA provides that "the Board shall consist of five instead of three members." 29 U.S.C. § 153(a). Section 3(b) of the NLRA states, in relevant part, that:

> The Board is authorized to delegate to any group of three or more members any or all of the powers which it may itself exercise. . . . A vacancy in the Board shall not impair the right of the remaining members to exercise all of the powers of the Board, and three members of the Board shall, at all times, constitute a quorum of the Board, except that two

members shall constitute a quorum of any group designated pursuant to the first sentence hereof.

29 U.S.C. § 153(b).

This section encompasses four provisions. First, the delegation provision states that "[t]he Board is authorized to delegate to any group of three or more members any or all of the powers which it may itself exercise." *Id.* Second, the vacancy provision provides that "[a] vacancy in the Board shall not impair the right of the remaining members to exercise all of the powers of the Board." *Id.* Third, the Board quorum provision states that "three members of the Board shall, at all times, constitute a quorum of the Board." *Id.* Finally, the delegee group quorum provision states that "two members shall constitute a quorum of any [three-member] group [to which the Board delegated its powers pursuant to the delegation provision.]" *Id.*

B. Factual Background

This case arises out of unfair labor practice charges brought in 2005 by Intervenor, United Food and Commercial Workers Union Local 1996 (United), and the General Counsel of the Board against Petitioner Laurel Baye Healthcare of Lake Lanier, Inc. (Laurel Baye). On July 12, 2006, after a hearing, an administrative law judge issued a proposed decision and order concluding that Laurel Baye had committed violations of sections 8(a)(1) and (a)(5) of the NLRA. Laurel Baye filed with the Board exceptions to the ALJ's decision, which the Board accepted on September 7, 2006.

Between the time that the ALJ issued his decision and the time that the Board took up review of Laurel

Baye's exceptions to the decision the previously-five-member Board underwent a series of dramatic personnel changes. On December 16, 2007, Board Chairman Robert J. Battista's term expired, leaving four members on the Board. On December 20, 2007, the remaining four members of the Board (Wilma Liebman, Peter Schaumber, Peter Kirsanow, and Dennis Walsh) unanimously voted to delegate all of its powers to a three-member group consisting of Board members Liebman, Schaumber and Kirsanow, effective December 28, 2007.

The purpose of this delegation of power was simple and transparent. According to the Board's minutes on that day, this action was done in anticipation "that in the near future [the Board] may for a temporary period have fewer than three Members," because the recess appointment terms for Members Walsh and Kirsanow were set to expire on December 31, 2007. The Board was of the view that "this action will permit the remaining two Members to issue decisions and orders in unfair labor practice and representation cases after [the] departure of Members Kirsanow and Walsh, because the remaining Members [Liebman and Schaumber] will constitute a quorum of the three-member group [under section 3(b) of the NLRA]." In addition to its own interpretation of the statutory text, the Board relied on the legal analysis set forth in a March 4, 2003 Memorandum Opinion issued by the Office of Legal Counsel of the U.S. Department of Justice. In its Memorandum Opinion, OLC concluded, as did the Board, that "if the Board delegated all of its powers to a group of three members, that group could continue to issue decisions and orders as long as a quorum of two members remained." Quorum Requirements, 2003 WL 24166831 (Mar. 4, 2003).

On December 31, 2007, the recess appointments of Members Walsh and Kirsanow expired. Since January 1, 2008, the Board has functioned with the two remaining members, Liebman and Schaumber, who acted as a two-member quorum of the three-member delegee group created by the Board's December 20, 2007, action. On February 29, 2008, Members Liebman and Schaumber issued a Decision and Order adopting the ALJ's rulings, findings and conclusions, and adopting the ALJ's recommended Order in full (with only inadvertent errors corrected). This Decision and Order was issued under the two members' authority as a two-person quorum of the three-member group designated by the Board. Kirsanow, by that time no longer a member of the Board, did not take part in hearing or resolving this case at all. Laurel Baye petitions this Court for review of the Board's decision. In so doing, "Laurel Baye does not challenge the merits of the Board's unfair labor practice findings or its remedy." Rather, Laurel Baye contends that the two members of the Board lacked the power to issue a Decision and Order in this case. The Board cross-petitions for enforcement of its unfair labor practice order.

II. ANALYSIS

This case concerns the interplay of the delegation, vacancy, and quorum provisions of section 3(b) of the NLRA, and requires us to determine whether, under these provisions, the two-member delegee group consisting of Members Liebman and Schaumber could lawfully issue an order finding that Laurel Baye engaged in unfair labor practices. Laurel Baye challenges both the legitimacy and continuing nature of the Board's delegation. The Board counters that its actions give effect to

every provision within section 3(b). Specifically, the Board posits that there is a general quorum requirement of three members, except where powers have been delegated to a group of three, in which case the two-member delegee group quorum provision and the vacancy provision allow the remaining two members of the Board to continue to act as a delegee group.

Laurel Baye argues for the invalidity of the Board's action under two rationales. First, it contends that the Board has no authority to delegate its power to a three-member group that it knows will be acting as a two-member group due to expected term expiration. In Laurel Baye's view, the Board's delegation cannot stand because it is simply a sham. The second formulation of Laurel Baye's argument is that even if the Board could make the initial delegation, that delegation cannot survive the loss of a quorum on the Board itself. Because we find the second formulation of the argument convincing, we pretermit the first.

"A cardinal principle of interpretation requires us to construe a statute 'so that no provision is rendered inoperative or superfluous, void or insignificant.'" *Asiana Airlines v. FAA*, 134 F.3d 393, 398 (D.C. Cir. 1998) (quoting *C.F. Commc'ns Corp. v. FCC*, 128 F.3d 735, 739 (D.C. Cir. 1997)). The Board's interpretation of section 3(b), however, violates this principle of statutory interpretation by eschewing various portions of the statutory language. Specifically, the Board's position ignores the requirement that the Board quorum requirement must be satisfied "*at all times*." 29 U.S.C. § 153(b) (emphasis added). Moreover, it ignores the fact that the Board and delegee group quorum requirements are not mutually exclusive. The delegee group quorum provision's lan-

guage does not eliminate the requirement that a quorum of the *Board* is three members. Rather, it states only that the quorum of any three-member *delegee group* shall be two. *Id.* The use of the word "except" is therefore present in the statute only to indicate that the delegee group's ability to act is measured by a different numerical value. *See id.* The Board quorum requirement therefore must still be satisfied, regardless of whether the Board's authority is delegated to a group of its members. Reading the two quorum provisions harmoniously, the result is clear: a three-member Board may delegate its powers to a three-member group, and this delegee group may act with two members so long as the Board quorum requirement is, "at all times," satisfied. *Id.* But the Board cannot by delegating its authority circumvent the statutory Board quorum requirement, because this requirement must always be satisfied.

Indeed, if Congress intended a two-member Board to be able to act as if it had a quorum, the existing statutory language would be an unlikely way to express that intention. The quorum provision clearly requires that a quorum of the Board is, "at all times," three members. 29 U.S.C. § 153(b). A modifying phrase as unambiguous as this denotes that there is no instance in which this Board quorum requirement may be disregarded. Contrary to the Board's contentions, Congress did not intend to use the delegee group quorum provision as an exception to the requirement that the Board quorum requirement must be met "at all times." Though the delegee group quorum provision is preceded by the prepositional phrase "except that," *id.*, Congress's use of differing object nouns within the two quorum provisions indicates clearly that each quorum provision is independent from the other. The establishment of a two-

member quorum of a subordinate group does not logically require any change in the provision mandating a three-member quorum for the Board as a whole. In fact, it does not seem odd at all that a sub-unit of any body would have a smaller quorum number than the quorum of the body as a whole. Quorums, after all, are usually majorities. A majority of three is smaller than a majority of five. It therefore defies logic as well as the text of the statute to argue, as the Board does, that a Congress which explicitly imposed a requirement for a three-member quorum "at all times" would in the same sentence allow the Board to reduce its operative quorum to two without further congressional authorization. Congress provided unequivocally that a quorum of the Board is three members, and that this requirement must be met at all times. The delegee group quorum provision does not eliminate this requirement.

The strained interpretation by the Board is contrary to basic tenets of agency and corporation law. As the Restatement (Third) of Agency sets forth, an agent's delegated authority terminates when the powers belonging to the entity that bestowed the authority are suspended. Restatement (Third) of Agency § 3.07(4) (2006). An agent's delegated authority is also deemed to cease upon the resignation or termination of the delegating authority. 2 William Meade Fletcher, Fletcher Cyclopedia of the Law of Corporations § 504 (2008); *see Emerson v. Fisher*, 246 F. 642, 648 (1st Cir. 1918) (holding that a corporate treasurer's resignation terminated any authority delegated by the treasurer to other individuals). Moreover, as Fletcher notes, a delegating board of directors's powers are suspended whenever the board's membership falls below a quorum. *See* 2 Fletcher Cyclopedia of the Law of Corporations § 421 ("If there are

fewer than the minimum number of directors required by statute, [the remaining directors] cannot act as a board."). In the context of a board-like entity, a delegee's authority therefore ceases the moment that vacancies or disqualifications on the board reduce the board's membership below a quorum. It must be remembered that the delegee committee does not act on its own behalf. The statute confers no authority on such a body; it only permits its creation. The only authority by which the committee can act is that of the Board. If the Board has no authority, it follows that the committee has none. The delegee's authority to act on behalf of the Board therefore ceased the moment the Board's membership dropped below its quorum requirement of three members.

We reach this conclusion despite the Board's contention that this court has permitted other agencies to continue to function with fewer than a majority of their membership positions filled. Specifically, the Board cites to two cases from this court: *Railroad Yardmasters of America v. Harris*, 721 F.2d 1332 (D.C. Cir. 1983), and *Falcon Trading Group, Ltd. v. SEC*, 102 F.3d 579 (D.C. Cir. 1996).

In *Yardmasters*, we held that the two sitting members of the National Mediation Board (NMB) could properly delegate the NMB's powers to one of the members, despite the fact that one of the two delegating members resigned later that day, thereby leaving a single NMB member to conduct the NMB's business. *Yardmasters*, 721 F.2d at 1342-45. The Board argues that our reasoning in *Yardmasters* enables the Board to take action to continue to operate. In *Yardmasters*, we noted that if the NMB "can use its authority to delegate

in order to operate more efficiently, then a *fortiori* the Board can use its authority in order to continue to operate when it otherwise would be disabled." *Id.* at 1340 n.26. Similarly, the Board argues that allowing the Board to act to preserve its continuity would give effect to the language and purpose of the NLRA. After all, the Board contends, the inclusion of the delegation provision was designed to ensure that the Board was able to operate more efficiently. Moreover, the NLRA was designed to prevent "industrial strife." 29 U.S.C. § 151. As a result, the argument goes, the NLRB's reliance on a combination of its delegation, vacancy, and quorum provisions to ensure that it would continue to operate despite upcoming vacancies was consistent with the purpose of the NLRA, and was therefore proper.

We are unmoved. Our reasoning in *Yardmasters* does not apply to this case. In that case, we went to great lengths to note the "narrowness of our holding." *Yardmasters*, 721 F.2d at 1344. We expressly noted that our holding governed only whether the NMB was able to delegate its authority to a single NMB member. *See id.* at 1344-45. Further, we stressed that the holding was not meant to extend to agencies such as the NLRB, in light of the fact that the NLRB was "principally engaged in substantive adjudications [concerning] unfair labor practices [and] enforc[ing] individual rights. . . . " *Id.* at 1345. We conclude that *Yardmasters*' reasoning is limited to its statutory context. Therefore, the principle set forth in *Yardmasters* that an agency board's delegation of power is "not affected by changes in personnel" due to it being "[i]nstitutional" in nature does not apply here. *Id.* at 1343. In response to the dissent's concerns that the court's validation of the NMB's delegation could lead to abuse of power, the *Yardmas-*

ters court specifically stressed the fact that the NMB's functions were entirely unlike the functions of the National Labor Relations Board, which "adjudicate[s] unfair labor practices [and] seek[s] to enforce individual rights under the Act." *Yardmasters*, 721 F.2d at 1345. We emphasized that "the [NMB's] role is perhaps best illustrated by its critical duty . . . of notifying the President that a labor dispute threatens 'substantially to interrupt interstate commerce to a degree such as to deprive any section of the country of essential transportation service.'" *Id.* (quoting 45 U.S.C. § 160 (1976)). Our reliance on this distinction as a basis for our holding in *Yardmasters* strongly suggests—if not expressly states—that *Yardmasters'* holding was not intended to apply in cases involving the adjudication of unfair labor practices, such as the case before us now.

Likewise, *Falcon Trading* offers no support to the Board. In that case, we approved the SEC's promulgation of a new quorum rule, which stated that the SEC's quorum would equal the number of remaining commissioners if the number of remaining commissioners fell below the normal three-commissioner quorum; we also upheld an SEC opinion issued by a two-member Commission acting pursuant to this quorum provision. *Falcon Trading*, 102 F.3d at 582. We held that, "*[i]f not otherwise constrained by statute, an agency sufficiently empowered by its enabling legislation* may create its own quorum rule." *Id.* (emphasis added). We approved the SEC's power to determine how many members constituted a quorum because Congress "specifically bestowed [that power] on the Commission." *Id.* Further, we noted that the SEC's quorum determination was lawful because it was "not countermanded elsewhere by

Congress, as for example in an explicit statutory quorum provision." *Id.*

This highlights the fundamental problem with the Board's reasoning. The Securities Exchange Commission was sufficiently empowered by its enabling legislation; the Board is not. Indeed, Congress has spelled out precise quorum provisions for the Board. Congress provided that a quorum of the Board is three members. The Board does not have three members. It cannot act. Though section 3(b) gives the Board power to delegate its authority to a group of members, this authority is necessarily limited by the fact that the delegation authority allows the Board to grant its power only to a group of three or more members. *See* 29 U.S.C. § 153(b). The Board's delegation power is also obviously limited by the fact that the Board quorum provision establishes that the power of the Board to act exists when the Board consists of three members. *Id.* The delegee group's delegated power to act, however, ceases when the Board's membership dips below the Board quorum of three members. *See supra* at pp. 472-74. It therefore follows that where, as here, a delegee group acts on behalf of the Board, *see id.*, the Board quorum requirement still must be satisfied.

Further, the Board's interpretation is not supported by the text of the vacancy provision. The vacancy provision states only that "[*a*] vacancy in the Board shall not impair the right of the remaining members to exercise all of the powers of the Board." 29 U.S.C. § 153(b) (emphasis added). One reading of this text would suggest the Board's ability to act is impaired if there is more than one vacancy on the Board. The Board quorum provision, however, clarifies that "three members of the

Board shall, at all times, constitute a quorum of the Board." *Id.* A quorum is defined as "[t]he minimum number of members (usu. a majority of all the members) who must be present for a deliberative assembly to legally transact business." Black's Law Dictionary 1284 (8th ed. 2004). The Board's ability to legally transact business exists only when three or more members are on the Board. Considering the language of the vacancy and Board quorum provisions in tandem, it is clear that the vacancy provision allows the Board to function fully with at most two vacancies. This is the maximum number of vacancies that the Board can sustain and still maintain a quorum. This is consistent with the delegation provision's requirement that the Board may delegate its authority only to groups of three or more members. 29 U.S.C. § 153(b).

After oral argument, the Board called our attention to a new decision, *Northeastern Land Services, Ltd. v. NLRB*, 560 F.3d 36 (1st Cir. 2009). The Board asserts that the First Circuit decided the same issue as the one before us and decided it in favor of the Board. We note that the First Circuit decided the case in terms of the continuing validity of a three-member delegee group after the expiration of the term of one member. The determination of that issue is not necessary to our decision, given that we have determined that the lack of a quorum on the Board as a whole is the determining factor. Concededly, the Board prevailed before the First Circuit on facts parallel to those before us. But the First Circuit did not decide the same issue. In any event, the First Circuit's decisions are not binding precedent upon us. We are bound only by the decisions of our circuit and the Supreme Court. This is in keeping with the Supreme Court's recognition that each court of appeals

has a duty to resolve the rules independently of each other. *See United States v. Mendoza*, 464 U.S. 154, 160, 104 S. Ct. 568, 78 L. Ed. 2d 379 (1984) ("Allowing only one final adjudication would deprive this Court of the benefit it receives from permitting several courts of appeals to explore a difficult question before this Court grants certiorari." (citing *E.I. du Pont de Nemours & Co. v. Train*, 430 U.S. 112, 135 n.26, 97 S. Ct. 965, 51 L. Ed. 2d 204 (1977))).

III. CONCLUSION

Finally, we acknowledge that the case before us presents a close question, and that neither OLC's interpretation nor the Board's desire to continue to function is entirely indefensible. Both were undoubtedly born of a desire to avoid the inconvenient result of having the Board's adjudicatory wheels grind to a halt. Nevertheless, we may not convolute a statutory scheme to avoid an inconvenient result. Our function as a court is to interpret the statutory scheme as it exists, not as we wish it to be. Any change to the statutory structure must come from the Congress, not the courts. U.S. Const. art. I, § 1. Perhaps a properly constituted Board, or the Congress itself, may also minimize the dislocations engendered by our decision by ratifying or otherwise reinstating the rump panel's previous decisions, including the case before us. *See, e.g., FEC v. Legi-Tech, Inc.*, 75 F.3d 704 (D.C. Cir. 1996) (affirming properly reconstituted FEC Board's ratification remedy for its unconstitutional membership).

In the meantime, however, because we determine that the Board was not properly constituted and it did not have the authority to issue the order before us, we

grant the petition of Laurel Baye Healthcare and order that the decision of the NLRB be vacated, and the case remanded for further proceedings before the Board at such time as it may once again consist of sufficient members to constitute a quorum. We also deny the Board's cross-petition for enforcement of its invalid order.

So ordered.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term 2008

No. 08-1162
Consolidated with 08-1214

LAUREL BAYE HEALTHCARE OF LAKE LANIER, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

UNITED FOOD AND COMMERICAL WORKERS INTERNATIONAL UNION, LOCAL 1996, INTERVENOR

Filed: May 1, 2009

On Petition for Review and Cross-Application for Enforcement of an Order of the National Labor Relations Board

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Before: SENTELLE, *Chief Judge*, and TATEL, *Circuit Judge*, and WILLIAMS, *Senior Circuit Judge*

JUDGMENT

These causes came on to be heard on the petition for review and cross-application forenforcement of an Order

of the National Labor Relations Board and were argued by counsel. On consideration thereof, it is

ORDERED and **ADJUDGED** that the petition for review is granted, the order under review is vacated, the cross-application for enforcement is denied, and the case remanded for further proceedings before the Board at such time as it may once again consist of sufficient members to constitute a quorum, in accordance with the opinion of the court filed herein this date.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY:

Michael C. McGrail
Deputy Clerk

Date: May 1, 2009
Opinion for the court filed by Chief Judge Sentelle.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term 2008

No. 08-1162
Consolidated with 08-1214
NLRB-10CA35958

LAUREL BAYE HEALTHCARE OF LAKE LANIER, INC.,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

UNITED FOOD AND COMMERCIAL WORKERS
INTERNATIONAL UNION, LOCAL 1996, INTERVENOR

Filed On: July 1, 2009

ORDER

Before: SENTELLE, Chief Judge, TATEL, Circuit Judge, and WILLIAMS, Senior Circuit Judge

Upon consideration of respondent's petition for panel rehearing filed on May 27, 2009, it is **ORDERED** that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/ Michael C. McGrail
Deputy Clerk

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term 2008

No. 08-1162
Consolidated with 08-1214
NLRB-10CA35958

LAUREL BAYE HEALTHCARE OF LAKE LANIER, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, LOCAL 1996, INTERVENOR

ORDER

Filed on: July 1, 2009

Before: SENTELLE, Chief Judge, and GINSBURG, HENDERSON, ROGERS, TATEL, GARLAND, BROWN, GRIFFITH, and KAVANAUGH, Circuit Judges, and WILLIAMS, Senior Circuit Judge

Upon consideration of respondent's petition for rehearing en banc and intervenor's petition for rehearing

en banc, the response thereto, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petitions be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/ Michael C. McGrail
Deputy Clerk

APPENDIX E

NATIONAL LABOR RELATIONS BOARD

Nos. 10-CA-35958 and 10-CA-35983

LAUREL BAYE HEALTHCARE OF LAKE LANIER, LLC

and

UNITED FOOD AND COMMERICAL WORKERS INTERNATIONAL UNION, LOCAL 1996

Feb. 29, 2008

DECISION AND ORDER

BY MEMBERS LIEBMAN AND SCHAUMBER

On July 12, 2006, Administrative Law Judge Lawrence W. Cullen issued the attached decision. The Respondent filed exceptions and a supporting brief, and the Charging Party filed an answering brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to adopt the judge's rulings, find-

ings,[1] and conclusions[2] and to adopt the recommended Order as modified[3] and set forth in full below.[4]

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[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] We reject the Respondent's argument that, under *Courier-Journal*, 342 NLRB 1093 (2004), it had no duty to bargain over changes to its health insurance benefits because it was acting pursuant to an annual review of those benefits. The Respondent waived this argument by failing to raise it before the judge. *See Yorkaire, Inc.*, 297 NLRB 401 (1989), enfd. 922 F.2d 832 (3d Cir. 1990).

The Respondent has excepted to the judge's statement that economic expediency is not a defense to employer unilateral conduct. We do not rely on the judge's statement to the extent it conflicts with settled Board law that an economic exigency or compelling economic considerations may justify unilateral action. *See, e.g., RBE Electronics of S.D.*, 320 NLRB 80 (1995); *Mike O'Connor Chevrolet*, 209 NLRB 701, 703 (1974), enf. denied on other grounds 512 F.2d 684 (8th Cir. 1975).

[3] We have modified the judge's recommended Order to correct certain inadvertent errors and to conform to our standard remedial language. We have substituted a new notice that reflects these changes.

The recommended Order properly required the Respondent, at the Union's request, to rescind its unilaterally implemented health insurance plan and restore the prior plan. See, e.g., *Berkshire Nursing Home, LLC*, 345 NLRB 220, 222 (2005); *Larry Geweke Ford*, 344 NLRB 628, 629 (2005). The Respondent may litigate in compliance whether it would be impossible or unduly or unfairly burdensome to restore the prior plan. See *Larry Geweke Ford*, supra at 629. If, however, the Union chooses continuation of the unilaterally implemented health insurance policy, then make-whole relief for that unilateral change is inapplicable. See *Brooklyn Hospital Center*, 344 NLRB 404 (2005). Although Member Liebman dissented on that point in *Brooklyn Hospital Center*, see *id.* at 404 fn. 3, she recognizes that it

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that the Respondent, Laurel Baye Healthcare of Lake Lanier, LLC, Buford, Georgia, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with United Food and Commercial Workers Union, Local 1996 (the Union) as the exclusive bargaining representative of its employees in the bargaining unit set forth below, by changing the employee dress code, attendance policy, vacation and sick pay benefits, and health insurance carriers, premiums, benefits, without first notifying the Union and affording it an opportunity to bargain about these changes.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

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is extant Board law and, for that reason alone, applies it here.

[4] Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the Board's powers in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Pursuant to this delegation, Members Liebman and Schaumber constitute a quorum of the three-member group. As a quorum, they have the authority to issue decisions and orders in unfair labor practice and representation cases. See Sec. 3(b) of the Act.

(a) Notify and give the Union an opportunity to bargain before making any change in the terms and conditions of employment of employees in the following appropriate unit:

> All full-time and part-time service and maintenance employees, CNA's, restorative aids, activity assistants, medical record clerks, central supply clerks, and unit secretaries, but excluding all employees employed by Healthcare Services Group, Inc., including RN's, LPN's and charge nurses, confidential employees, professional employees, guards and supervisors as defined in the Act.

(b) Upon request of the Union, rescind its unilaterally implemented changes in employee dress code, attendance policy, vacation and sick pay benefits, and health insurance carriers, premiums, and benefits, and restore the previously existing policies, including the previously existing health insurance policy.

(c) Make bargaining unit employees whole for any losses suffered as a result of those unilateral changes in the manner set forth in the remedy section of the judge's decision.

(d) Within 14 days from the date of this Order, remove from its files any reference to discipline imposed on unit employees pursuant to its unilaterally altered dress code and attendance policy, and within 3 days thereafter, notify any affected employees in writing that this has been done and that any such discipline will not be used against them in any way.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place des-

ignated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its facility in Buford, Georgia, copies of the attached notice marked "Appendix."[5] Copies of the notice, on forms provided by the Regional Director for Region 10, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, it shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since May 1, 2005.

(g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

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[5] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT refuse to bargain with United Food and Commercial Workers Union, Local 1996 (the Union) as the exclusive bargaining representative of our employees in the bargaining unit set forth below, by changing the employee dress code, attendance policy, vacation and sick pay benefits, and health insurance carriers, premiums, and benefits, without first notifying the Union and affording it an opportunity to bargain about these changes.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights set forth above.

WE WILL notify and give the Union an opportunity to bargain before making any change in the terms and conditions of employment of employees in the following appropriate unit:

> All full-time and part-time service and maintenance employees, CNA's, restorative aids, activity assistants, medical record clerks, central supply clerks, and unit secretaries, but excluding all employees employed by Healthcare Services Group, Inc., including RN's, LPN's and charge nurses, confidential employees, professional employees, guards and supervisors as defined in the Act.

WE WILL, upon request of the Union, rescind our unilaterally implemented changes in employee dress code, attendance policy, vacation and sick pay benefits, and health insurance carriers, premiums, and benefits, and restore the previously existing policies, including the previously existing health insurance policy.

WE WILL make bargaining unit employees whole for any losses suffered as a result of those unilateral changes, with interest.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to discipline imposed on unit employees pursuant to our unilaterally altered dress code and attendance policy, and WE WILL, within 3 days thereafter, notify any affected employees in writing that this has been done and that any such discipline will not be used against them in any way.

LAUREL BAYE HEALTHCARE OF LAKE LANIER, LLC

Wanda Pate Jones, Esq., for the General Counsel.
Clifford H. Nelson Jr., Esq., for the Respondent.
James D. Fagan Jr., Esq., for the Charging Party.

DECISION

STATEMENT OF THE CASE

LAWRENCE W. CULLEN, Administrative Law Judge. This case was heard before me on March 9, 2006, pursuant to a consolidated complaint issued by the Regional Director for Region 10 of the National Labor Relations Board (the Board) on January 30, 2006. The complaint alleges that Laurel Baye Healthcare of Lake Lanier, LLC (the Respondent or Laurel Baye) violated Section 8(a)(1) and (5) of the National Labor Relations Act (the Act).

The complaint is based on charges filed by United Food and Commercial Workers Union, Local 1996 (the Charging Party or the Union). The complaint is joined by the answer of Respondent wherein it denies the commission of any violations of the Act.

Upon consideration of the testimony of the witnesses, the exhibits received at the hearing and the positions of the parties at the hearing and the briefs filed by the General Counsel and the Respondent, I make the following

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT

The complaint alleges, Respondent admits, and I find that at all times material, that Respondent has been a South Carolina corporation with an office and place of

business in Buford, Georgia, where it has been engaged in providing skilled care nursing services, that during the past calendar year, a representative period, Respondent, in conducting its business operations described above, derived gross revenues in excess of $100,000 and purchased and received at its Buford, Georgia facility goods valued in excess of $50,000 directly from points outside the State of Georgia and has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION

The complaint alleges, Respondent admits, and I find that at all times material, the Union has been a labor organization within the meaning of Section 2(5) of the Act.

III. APPROPRIATE UNIT

The complaint alleges, Respondent admits, and I find that at all times material, that the following employees of Respondent herein called the unit, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 8(b) of the Act:

> All full-time and part-time service and maintenance employees, CNA's, restorative aids, activity assistants, medical record clerks, central supply clerks, and unit secretaries, but excluding all employees employed by Healthcare Services Group, Inc., including RN's, LPN's and charge nurses, confidential employees, professional employees, guards and supervisors as defined in the Act.

IV. THE ALLEGED UNFAIR LABOR PRACTICES

The facts in this case are largely undisputed. On November 26, 2004, in a secret-ballot election under the supervision of the Regional Director for Region 10 of the Board, a majority of the unit employees designated and selected the Union as their representative for the purposes of collective bargaining with Respondent with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment and on June 27, 2005, the Board certified the Union as the exclusive bargaining representative of the employees in the aforesaid unit. The complaint alleges, Respondent denies, and I find that since November 26, 2004, the Union has been, and is the representative of a majority of the employees in the unit for purposes of collective bargaining and by virtue of Section 9(a) of the Act, has been, and is the exclusive representative of the unit for purposes of collective bargaining.

The complaint alleges that in about May and August 2005, Respondent violated Section 8(a)(1) and (5) of the Act and made unilateral changes to the terms and conditions of employment for bargaining unit employees including a new dress code, new attendance policy, new health insurance plan carriers and benefits, a reduction in vacation pay benefits, and a change in vacation notice requirements. The General Counsel in her brief withdrew that portion of paragraph 16(a) of the complaint with respect to the allegation that Respondent unilaterally changed the vacation notice requirements. Respondent admits in a joint stipulation filed at the hearing, that at all times since the November 26, 2004 representative election, it has refused to recognize and bargain

with the Union and that it has not notified or given the Union an opportunity to bargain about any changes in bargaining unit employees' terms and conditions of employment.

On July 18, 2005, the Union filed a charge against Respondent for failing to engage in collective bargaining. A complaint in that underlying case, Case 10-CA-35752, was issued on July 27, 2005, alleging that Respondent violated Section 8(a)(1) and (5) of the Act by refusing the Union's request to bargain and furnish information following its certification. Respondent timely filed its answer to that complaint and on August 16, 2005, the Acting General Counsel filed a Motion for Summary Judgment. On August 18, 2005, the Board issued an Order Transferring the Proceeding to the Board and a Notice to Show Cause why the motion should not be granted. Respondent filed a reply and attached to its reply an amended answer in which it asserted several affirmative defenses based on the Union's recent disaffiliation from the AFL-CIO. On December 28, 2005, the Board issued its Decision granting the Motion for Summary Judgment and directing Respondent to bargain with and provide information to the Union. The Board took official notice of the underlying representation proceeding in Case 10-RC-15475. It was stipulated at the hearing in the instant case before me that Respondent has filed a Petition for Review of the Board's Decision and Order, reported at 346 NLRB 159 (2005), with the Fourth Circuit Court of Appeals in Richmond, Virginia.

The General Counsel sets forth in her argument in her brief what she terms as controlling legal precedent as follows:

Section 8(a)(5) obligates an employer to bargain with its employees' representative in good faith regarding 'wages, hours and other terms and conditions of employment.' *NLRB v. Borg-Warner Corp*, 356 U.S. 342, 343 (1958); *Fiberboard Corp. v. NLRB*, 379 U.S. 203, 210 (1964). As such, an employer must notify and consult with its employees' chosen union before imposing changes in wages, hours, and conditions of employment. *NLRB v. Katz*, 369 U.S. 736, 743 (1962). An employer's obligation to bargain arises on the date a majority of the appropriate bargaining unit employees select the union as their representative and it is not a defense that unilateral changes were made pursuant to established company policy, without antiunion motivations or were economically expedient. *Gulf States Manufacturers, Inc.*, 261 NLRB 852, 863-864 (1982).

To be found unlawful, the unilaterally imposed change must be ". . . material, substantial, and significant" and must have a "real impact" on or be 'a significant detriment to' the employees or their working conditions. Unilateral changes made prior to the certification are not excused and, absent compelling economic considerations for doing so, an employer acts at its peril in making unilateral changes in terms and conditions of employment during the period between an election and a union's certification, *Mike O'Connor Chevrolet*, 209 NLRB 701, 703 (1974).

I find that these principles do apply to the instant case in addressing the issues before me for determination as the issues are set out by the General Counsel in

her brief and as noted in the answers to the issues as addressed by me:

1. "Whether Respondent's unilateral issuance of a new attendance policy violated Sections 8(a)(1) and (5) of the Act?" Answer: Yes!

2. "Whether Respondent's unilateral issuance of a new dress code violated Section 8(a)(1) and (5) of the Act?" Answer: Yes!

3. "Whether Respondent's unilateral changes to the health insurance plan carriers, premiums and benefits violated Section 8(a)(1) and (5) of the Act?" Answer: Yes! "or were these changes privileged by compelling economic circumstances" Answer: No!

4. "Whether Respondent's unilateral reduction of vacation and sick pay from 8 hours to 7.5 hours per day violated Section 8(a)(1) [and] (5) of the Act?" Answer: Yes!

As noted above the facts in this case are largely undisputed either by specific stipulations of fact, Respondent's admissions to allegations in the complaint or the unrebutted testimony of Union Organizing Director Eric Taylor, certified nursing assistants (CNA's) Chantel Daniels and Rosetta Greenwood or the unrebutted testimony or concessions of Respondent's outside Benefit Consultant John Robert Black or the unrebutted admissions in the testimony of Director of Personnel Christine Avicolli. Additionally, Respondent's records and pertinent sections of its employee handbook support the credible testimony of the witnesses.

A. The Attendance Policy

CNA Greenwood testified about the written policy change by its terms effective May 1, 2005, on its face which shows that Respondent changed its attendance policy on May 1, 2005, in several respects. Prior to the May 1, unilateral changes which were implemented by then Facility Administrator Melissa Franklin at meetings held with the employees, the attendance policy was set out in the "attendance/tardiness section" of the employee handbook in separate sections covering tardiness, calling in, unscheduled absences and the definition of unscheduled absences which excluded up to four periods of unscheduled medical absences with a written physician's excuse. It contained a progressive disciplinary policy concerning tardiness moving from counseling, to suspension and to termination.

It is undisputed that Respondent announced and implemented the new attendance policy effective May 1 without notifying and bargaining with the Union. The most significant change in the policy and the past practice concerning it was the change from an excused/unexcused system to a no-fault point system that set out a point for each instance of an absence or tardy irrespective of whether the absence would have been excused or was excused under the preexisting system. Thus, under the new policy, employees could be disciplined or discharged for excused absences as well as for unexcused absences.

The definitions of "tardiness" and "leave early" were also significantly changed from the definition of tardiness as 8 minutes past scheduled reporting time to reporting to work more than 2 minutes after the start time. Unscheduled absences under the preexisting pol-

icy included, "working less than (4) hours of your scheduled shift." Whereas "leave early" under the new policy was defined as "leaving earlier than five minutes before the end of the scheduled shift" and "absence" was defined as "Failure to work an entire scheduled shift."

Respondent contends that the changes were not implemented as its new Director of Personnel Christine Avicolli, who commenced her duties in July 2005, could find no evidence that employees had ever received a copy of the policy and no evidence that attendance was being tracked by the director of nursing and that there was no evidence that employees had received counseling or other corrective evidence under the new policy. Respondent further relies on the testimony of Avicolli that she, herself, did not take steps to implement the new attendance policy.

Analysis

I find that after consideration of the foregoing contentions of the parties and a review of the evidence, it is clear that the policy changes were material, substantial, and significant mandatory subjects of bargaining which were implemented by Franklin according to the unrebutted testimony of Greenwood and the existence of the written policy itself. There is no question that the unilateral changes significantly changed the employees' terms and conditions of employment. Respondent admits that it implemented the changes without notifying and affording the Union an opportunity to bargain concerning them. I find that the implementation of the unilateral changes materially affected the unit employees' terms and conditions of employment and that Respondent thereby violated Section 8(a)(1) and (5) of the Act.

Toledo Blade Co., 343 NLRB 385 (2004); *Dorsey Trailers, Inc.*, 327 NLRB 835 (1999).

B. The Dress Code

In late April 2006, Office Administrator Melissa Franklin, announced a change in Respondent's dress code to the unit employees at the same meetings at which she announced the attendance policy changes. The preexisting dress code was set out in the employee handbook in pertinent part as follows:

> In general, blue jeans, T-shirts, clothing advertising any product, service or organization or other forms of sports or trendy attire are not acceptable working apparel for any staff who have contacts with residents or the general public. Shoes should be closed-toe and in good repair. As safety for our employees and residents is a primary concern, open-toe and sling-back shoes should not be worn. Similarly, jewelry should not adversely affect the safety of residents or staff. For example, large, sharpedged rings and dangling earrings could injure you or a resident.
>
> . . . .
>
> Jeans and other forms of work clothes may be permissible for employees engaged with work that could cause their clothes to become heavily soiled. Example: Laundry or dietary.
>
> An employee's hair should be kept clean & arranged neatly so as not to interfere with the employee's assigned duties. Depending on duty assignment or work area, an employee with long hair may be required to wear a hair net.

The General Counsel points out in her brief that the preexisting policy's sole reference to shoes was that they be closed-toe and that no slingbacks should be worn, that the policy was silent about white scrubs and shoes. The code required that hair be clean and neatly arranged but made no references to hair color, tattoos or body piercings. However, the new dress code required for the first time that employees wear scrubs and white shoes. Greenwood testified that on the same day as the announcement she and other unit employees purchased white shoes. Greenwood further testified that to comply with the new policy, employees removed body piercings and covered tattoos and ceased coloring their hair. Thus, it is clear that the new dress code was implemented and was adhered to by the unit employees. The new policy lists guidelines which must be adhered to such as "No exposed body piercing," "Fingernails must be trimmed to an acceptable length." "Tattoos that are in visible locations must be covered while at work (e.g., tattoos on arms, hands)." "Hair coloring should be of a natural color. No multicolor or unusual hair coloring outside of generally accepted norms is allowed."

Analysis

Appropriate wearing apparel is a mandatory subject of bargaining, *St. Luke's Hospital*, 314 NLRB 434, 440 (1994); *Public Service Co. of New Mexico*, 337 NLRB 193, 199-200 (2001). It is clear that the aforesaid changes in dress code were material, substantial and significant, even requiring the unit employees to expend their own funds to pay for them as in the case of the white shoes and scrubs. These new requirements differed significantly from the requirements imposed by the preexisting dress code policy. It is undisputed that the Re-

spondent did not provide the Union with notice of the changes and an opportunity to bargain prior to the implementation of the new dress code. I accordingly find that Respondent violated Section 8(a)(1) and (5) of the Act thereby.

C. Unilateral Changes in Preexisting Health Insurance Carriers, Premiums, and Benefits

The complaint alleges that Respondent also violated Section 8(a)(1) and (5) of the Act by unilaterally, without providing notice and an opportunity to bargain to the Union, making changes in the health insurance carriers and the premiums and benefits and cost of the health insurance provisions. John Black testified that he is the principal owner of Benefits Management Group (BMG) which provides consulting services and is a broker for Respondent in the review, analysis, negotiation, placement, and administration of health insurance polices for Respondent's employees and their dependents. BMG originally commenced performing these services for Respondent in 2002. The various health insurance policies of Respondent are reviewed annually. Prior to this BMG sends out requests for proposals (RFPs) to the current insurers and to other carriers and prepares and negotiates rates and policies with the carriers and prepares a template of what BMG is seeking on behalf of the Respondent and the plans of the carriers for purposes of comparison. In 2005, the then current health insurance policies were due to expire on April 30, 2005, and new policies had to be in place effective on May 1, 2005. In January, Black, on behalf of BMG sent RFPs to its then existing insurance carriers and other potential carriers for comparison of rates and benefits and

was awaiting responses from them. However, in February 2005, BMG received letters from existing carriers who advised they would terminate the relationship on April 30, 2005. This occurred prior to the anticipated renewal. BMG then proceeded to compare the various policies and determined which proposals, which had been further negotiated by BMG with the carriers, were the best options for Respondent. It determined that the two new plans which were preferred provider plans by CIGNA and two gap plans provided by American Fidelity were the best option to cover the deductibles not covered by the CIGNA plans and in early to mid-March BMG met with former Director of Human Resources David Johnson and Benefits Coordinator Bridget Harelson and presented BMG's recommendations to them. A few days later BMG was notified by Respondent that Respondent was accepting BMG's recommendations. Ultimately, the plans were put into effect commencing on May 1, 2005. It is undisputed that the carriers were changed, and the cost and benefits and other terms of the health insurance policies were changed. The changes are as follows: There was an increase in premium costs. Respondent would pay a flat rate of $250 per month rather than continuing to pay 75 percent of the cost which would have caused Respondent to bear a greater share of the premiums as the premiums escalated. The policies were to be implemented corporate-wide and were not limited to the Lake Lanier facility. BMG representatives and Harelson and Andre Dyer, the Lake Lanier facility director of personnel met with the unit employees at the Lake Lanier facility on March 31 and April 1, 2005, and conducted an open enrollment.

Analysis

It is undisputed that the Respondent was aware of the upcoming renewals on November 26, 2004, when the Union won the election, on June 27, 2005, when the Union was certified, in January 2005, when BMG sent out the requests for proposals, in February 2005, when BMG was notified of the intent of the current insurance carriers to terminate the various policies, when BMG met with Respondent's director of personnel and benefits coordinator and on March 31 and April 1, the dates the Respondent met with its employees to explain the changes in policy and to conduct the open enrollment then for the new policies and on the date (May 1, 2005) when the new policies became effective. The record in this case clearly demonstrates the Respondent had many opportunities to notify the Union and offer to negotiate these changes in carriers, benefits and premium costs of the insurance but steadfastly declined to afford the Union with notice and an opportunity to bargain. Union Representative Eric Taylor testified the Union did not learn of the changes until November 2, 2005. It is also clear that the changes regarding the health insurance policies were material, substantial, and significant and had a genuine impact on the employees who were forced to carry a heavier burden in their share of the cost whereas the Respondent insulated itself against additional rate increases by imposing a flat rate on the employer's portion of the premiums.

I find there is no basis for Respondent's contention that it had an exigency of either an emergency or less sensitive type which required immediate action to protect the employees' health insurance coverage so as to excuse the Respondent's failure to notify the Union and

offer to bargain prior to effecting the changes in their health insurance coverage. I find that Respondent violated Section 8(a)(1) and (5) of the Act by implementing the unilateral changes in the Insurance Carriers' premiums and benefits. *Bottom Line Enterprises*, 302 NLRB 373 (1991); *RBE Electronics of S.D.*, 320 NLRB 80 (1995); *Brook Meade Health Care Acquirers, Inc.*, 330 NLRB 775 (2000).

D. Reduction of Vacation and Sick Leave Pay

The undisputed testimony of Rosetta Greenwood and Chantel Daniels established that the Respondent had, since their employment in 2001 and 2002 respectively, paid employees 8 hours for each day of vacation or sick leave. However, after new Director of Personnel Christine Avicolli commenced her employment with Respondent in July 2005, she was informed by other management employees who trained her that the employees were only to be paid 7.5 hours a day for vacation days and sick leave. She began to pay employees the lower 7.5-per day rate for vacation and sick leave after August 22, 2005. The employees protested and Greenwood even sent a copy of the sick leave and vacations parts of the policy to Avicolli.

Analysis

I credit the unrebutted testimony of Greenwood and Daniels and note that Avicolli conceded that she had made the changes. Respondent presented no evidence to refute their testimony. It is also undisputed that Respondent did not provide the Union with notice of the changes and an opportunity to bargain concerning them. I find that Respondent violated Section 8(a)(1) and (5) of

the Act thereby as the changes in vacation and sick leave pay were "wages" as encompassed in the Act and the Respondent had a duty to bargain with the Union concerning them. I reject Respondent's contention that these reductions were de minimus. *Rangaire Co.*, 309 NLRB 1043 (1992); *Litton Systems*, 300 NLRB 324, 321 fn. 34 (1990), enfd. 949 F.2d 249, 251-252 (8th Cir. 1991).

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent has violated and is violating Section 8(a)(1) and (5) of the Act.

THE REMEDY

Having found that Respondent has violated and is violating the Act by unilaterally changing and implementing a new health care plan for its unit employees, and by unilaterally imposing other changes in terms and condition of employment, it shall be ordered to cease and desist thereform and in any like or related manner, interfering with, restraining, or coercing its employees in the exercise of their rights under Section 7 of the Act. I further recommend that the Respondent restore the status quo ante and make whole any employees who suffered any additional cost or increase in premiums or health care cost they sustained as a result of the unilateral changes in the health care policies, and for any expenses and loss as a result of the other unilateral changes in the attendance policy, vacation pay and sick leave pay and

the changes in the dress code and from any discipline imposed on the employees pursuant to the imposition of the aforesaid unilateral changes. The reimbursement to employees shall be computed as prescribed in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F2d. 502 (6th Cir. 1971), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

Board precedent establishes that the appropriate remedy for a unilateral change, including changes to corporate health care plans, is a restoration order and rescission, upon request. The Board has also held that the "standard remedy for unilaterally implemented changes in health insurance coverage is to order the restoration of the status quo ante." *Larry Geweke Ford*, 344 NLRB 628 (205).

[Recommended Order omitted from publication.]

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No. 09-377

Supreme Court, U.S.
FILED
OCT 2 - 2009
OFFICE OF THE CLERK

In The Supreme Court of the United States

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

LAUREL BAYE HEALTHCARE
OF LAKE LANIER, INC.,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF RESPONDENT

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QUESTION PRESENTED

Whether Section 3(b) of the National Labor Relations Act, 29 U.S.C. § 153(b), authorizes the National Labor Relations Board to act when only two of its five positions are filled, if the Board has previously delegated its full powers to a three-member group of the Board that includes the two remaining members.

CORPORATE DISCLOSURE STATEMENT

Laurel Baye Healthcare of Lake Lanier, Inc. certifies that it has no parent companies and there are no publicly-held companies having a 10 percent or greater ownership interest in the corporation.

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OPINIONS BELOW

The opinion of the court of appeals is reported at 564 F.3d 469. The decision and order of the National Labor Relations Board ("Board") is reported at 352 N.L.R.B. 179.

JURISDICTION

The judgment of the court of appeals was entered on May 1, 2009. The Board's petitions for rehearing and for rehearing en banc were denied on July 1, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

STATUTORY PROVISIONS INVOLVED

Section 3 (b) of the National Labor Relations Act, 29 U.S.C. § 153 (b) is set forth below:

> The Board is authorized to delegate to any group of three or more members any or all of the powers which it may itself exercise. . . . A vacancy in the Board shall not impair the right of the remaining members to exercise all of the powers of the Board, and three members of the Board shall, at all times, constitute a quorum of the Board, except that two members shall constitute a quorum of any group designated pursuant to the first sentence hereof. The Board shall have an official seal which shall be judicially noticed.

STATEMENT OF CASE

On December 16, 2007, the term of Board Chairman Robert J. Battista expired, leaving four members of the Board. On December 20, 2007, the Board, acting through its remaining four members temporarily delegated all of its powers to Members Liebman, Schaumber, and Kirsanow, acting as a three-member group. This temporary delegation, which was effective December 28, 2007, was made in anticipation of the impending expiration of the recess appointments of Members Kirsanow and Walsh at the expiration of the then-current session of Congress and the substantial likelihood that because of disagreements between the President and the Senate, no new Board members would be confirmed until after a new President took office in 2009. The Board acted with the specific intent that Members Liebman and Schaumber would continue to issue decisions and orders as a de-facto two-member panel. The recess appointments of Members Walsh and Kirsanow did expire on December 31, 2007, and since January 1, 2008, the Board has been functioning with two members, Liebman and Schaumber.

On February 29, 2008, asserting that they were acting as a quorum of the three-member group that purported to include the previously-departed Member Kirsanow, Chairman Schaumber and Member Liebman issued a Decision and Order finding that Laurel Baye Healthcare of Lake Lanier, Inc., Respondent herein, had committed violations of §§ 8(a)(1) and (5) of the Act, 29 U.S.C. §§ 158(a)(1), (5). The Board ordered affirmative relief.

Respondent subsequently filed a petition for review in the United States Court of Appeals for the District of Columbia Circuit, and the Board filed a cross-petition seeking enforcement of its order. At the request of all parties, the D.C. Circuit designated this case as the lead case and expedited oral argument, which was held on December 4, 2008. On May 1, 2009, a panel of the D.C. Circuit (Chief Circuit Judge Sentelle, Circuit Judge Tatel, and Senior Circuit Judge Williams) issued a unanimous opinion granting the petition for review and denying the Board's cross-application for enforcement.

The D.C. Circuit found it unnecessary to decide whether the Board's delegation of powers to a three-member group, knowing that only two would remain to decide cases, was a "sham," as it concluded that the case could be resolved on the basis of the Board's lack of a quorum. The court focused on the statutory requirement for a three-member quorum "at all times" and rejected the Board's contention that the two-member quorum of a three-member group was an "exception" that effectively overrode the three-member quorum requirement.

In rejecting the Board's argument, the court of appeals explained:

> Specifically, the Board's position ignores the requirement that the Board quorum requirement must be satisfied "*at all times*." 29 U.S.C. § 153(b) (emphasis added). Moreover, it ignores the fact that the Board and delegee group quorum requirements are not mutually exclusive. The delegee group quorum provision's language does not eliminate the requirement

> that a quorum of the *Board* is three members. Rather, it states only that the quorum of any three-member *delegee group* shall be two. Id. The use of the word "except" is therefore present in the statute only to indicate that the delegee group's ability to act is measured by a different numerical value. *See* id. The Board quorum requirement therefore must still be satisfied, regardless of whether the Board's authority is delegated to a group of its members. Reading the two quorum provisions harmoniously, the result is clear: a three-member Board may delegate its powers to a three-member group, and this delegee group may act with two members so long as the Board quorum requirement is, "at all times," satisfied. Id. But the Board cannot by delegating its authority circumvent the statutory Board quorum requirement, because this requirement must always be satisfied.

Id. at 472-473.

The court, citing the Restatement (Third) of Agency § 3.07(4) (2006), noted that "an agent's delegated authority terminates when the powers belonging to the entity that bestowed the authority are suspended." *Id.* at 473. The court thus concluded:

> In the context of a board-like entity, a delegee's authority therefore ceases the moment that vacancies or disqualifications on the board reduce the board's membership below a quorum. It must be remembered that the delegee committee does not act on its own behalf. The statute confers no authority on such a body; it

> only permits its creation. The only authority by which the committee can act is that of the Board. If the Board has no authority, it follows that the committee has none. The delegee's authority to act on behalf of the Board therefore ceased the moment the Board's membership dropped below its quorum requirement of three members.

Id.

The Board filed timely petitions for rehearing and rehearing en banc. The court of appeals denied these petitions on July 1, 2009. On September 29, 2009, the Board filed its petition for writ of certiorari.

ARGUMENT

The court of appeals correctly interpreted section 3(b) as not authorizing the Board to continue to issue decisions and orders in unfair labor practice and representation cases with only two sitting members. The court of appeals properly rejected the Board's contention that the prior delegation of powers to a three-member group authorized the Board to continue to issue decisions and orders when the Board's membership dropped below its statutory quorum of three members.

Although the court of appeals properly construed § 3(b), as the Board points out in its petition and as is set out more fully below, there is a split among the circuit courts that warrants definitive resolution by this Court. For that reason only, Respondent does not oppose the granting of the petition for certiorari. However, Respondent does oppose the ultimate relief

sought by the Board and requests that the Court affirm the court of appeals.

Respondent further opposes the Board's suggestion that because a petition for writ of certiorari is currently pending in *New Process Steel, LP v. NLRB,* No. 08-1457 (U.S. filed May 22, 2009), the "Court should therefore hold the Board's petition in this case pending its disposition of *New Process.*" Board Petition at 9. Rather, the appropriate course of action is for the Court to either grant or deny both petitions. If the Court decides to grant both petitions, the appropriate course of action is to consolidate the cases for briefing and oral argument.

I. THE FOUR COURTS THAT HAVE CONSIDERED THE TWO-MEMBER BOARD ISSUE HAVE APPLIED FOUR UNIQUE ANALYSES.

As of this date, in addition to the decision of the court of appeals in *Laurel Baye,* three other courts of appeals have addressed the issue of the Board's power to issue decisions and orders with only two sitting members. Although the score card currently rests at three to one in favor of the Board's power to issue two-member decisions, all four courts have followed distinct analytical approaches.

A. The First Circuit's Analysis

On March 13, 2009, the United States Court of Appeals for the First Circuit issued its decision in *Northeastern Land Services, Ltd. v. NLRB*, 560 F.3d 36 (1st Cir. 2009) (petition for certiorari pending), finding that the Board was empowered to issue two-member

decisions. The court's analysis was short and failed to discuss the import of the provision in § 3(b) that the Board's quorum was "at all times" three members:

> The Board's delegation of its institutional power to a panel that ultimately consisted of a two-member quorum because of a vacancy was lawful under the plain text of section 3(b). First, section 3(b) allowed the Board to delegate all of its powers to a three-member group. Second, the statute states that "[a] vacancy in the Board shall not impair the right of the remaining members to exercise all of the powers of the Board." The vacancy, which left the two-member quorum remaining, may not, under the terms of section 3(b), impair the right of the two-member quorum to exercise all powers of the Board.

Id. at 41.

B. The Seventh Circuit's Analysis

On the same day that the D.C. Circuit issued its decision in *Laurel Baye,* the United States Court of Appeals for the Seventh Circuit issued its decision in *New Process Steel, L.P. v. NLRB*, 564 F.3d 840 (7th Cir. 2009). Like the First Circuit, the court gave no consideration to the import of the § 3(b) mandate that "three members of the Board shall, at all times, constitute a quorum of the Board," choosing to focus instead on the vacancies and delegee group quorum provisions. The court concluded:

> The NLRB argues that the statute at issue is clear that the vacancy of one member of a three

> member panel does not impede the right of the remaining two members to execute the full delegated powers of the NLRB. As the NLRB delegated its full powers to a group of three Board members, the two remaining Board members can proceed as a quorum despite the subsequent vacancy. This indeed is the plain meaning of the text. As we read it, § 3(b) accomplished two things: first, it gave the Board the power to delegate its authority to a group of three members, and second, it allowed the Board to continue to conduct business with a quorum of three members but expressly provides that two members of the Board constitutes a quorum where the Board has delegated its authority to a group of three members. The plain meaning of the statute thus supports the NLRB's delegation procedure.

Id. at 845-846.

Although the Seventh Circuit was of the view that the meaning of the statutory language was "plain" and that resort to legislative history was unnecessary, it nevertheless found that the legislative history failed to affirmatively support the employer's proffered interpretation of the statute. *Id.* at 847. Finally, the court rejected the contention that the Board panel was not properly constituted because it failed to include three members at the time the case was assigned to the panel. *Id.* at 848.

C. The Second Circuit's Analysis

The Second Circuit also confronted this issue in *Snell Island SNF, LLC v. NLRB*, 568 F.3d 410 (2d Cir.

2009 (petition for certiorari pending). Well in advance of issuing its decision, the Second Circuit had the benefit of the three court decisions described above. After reviewing these decisions, the court of appeals candidly acknowledged the divergent approaches:

> To summarize, one of our sister circuits—the Seventh Circuit—has upheld a decision by the two-member NLRB panel based on the "plain meaning" of section 3(b) of the Act, noting that its interpretation comports with the legislative history of relevant amendments to the Act, without discussing principles of agency (i.e. principal-agent) law. [citation omitted] Another of our sister circuits—the D.C. Circuit—has overturned a decision by the same two-member panel based on the plain language of section 3(b) of the Act, noting that its interpretation comports with applicable principles of agency law, but without discussing the applicable legislative history. [citation omitted] A third sister circuit—the First Circuit—has concluded that the "plain text" of the Act authorized the decisions by the same two-member panel, without either discussing the legislative history or relevant principles of agency law. [citation omitted]
>
> The question regarding the jurisdiction of the NLRB's two-member panel is one ultimately to be resolved by the Supreme Court. In the meantime, we must make a determination in the present case.

(App. 18-19).

The court of appeals then deepened the existing split by applying the two-step analysis of *Chevron U.S.A., Inc. v. National Res. Def. Council, Inc.*, 467 U.S. 837 (1984), an analysis that the Board had never suggested was appropriate. Following this approach, the court of appeals first addressed whether the meaning of section 3(b) was "plain." The court of appeals agreed with the First Circuit that the initial delegation of powers to a three-member panel, knowing that only two would remain to decide cases, was not improper. 568 F.3d at 419. Next, the court of appeals agreed with the D.C. Circuit that the Board's statutory quorum of three members must be satisfied "at all times," but concluded that this did "not answer the precise question presented here: once the Board has lost its quorum, what happens to a panel that was duly constituted before the Board lost its quorum?" *Id.* at 420. Further, whereas the D.C. Circuit had relied upon principal/agency law to conclude that the delegee group lost its power when the Board lost its quorum, the court of appeals chose to look to the pertinent legislative history. *Id.* at 420-422. After reviewing in some detail the legislative history of Taft-Hartley, the court of appeals concluded that this legislative history "lacks any clear statement of intent regarding the jurisdiction of a plenipotentiary panel where the Board loses its quorum—the precise question that we face in this case." *Id.* at 423.

Having concluded that the statutory language was ambiguous, the court of appeals turned to step two of the *Chevron* analysis, whether the Board's interpretation was a reasonable interpretation to which the court of appeals was required to defer. Under this deferential standard of review, the court of appeals concluded that although the D.C. Circuit's

view was "reasonable," the Board's interpretation was also "reasonable" and thus should be upheld. *Id.* at 423-424.

II. THIS CASE SHOULD BE CONSOLIDATED WITH NEW PROCESS STEEL FOR BRIEFING AND ARGUMENT.

Contrary to the Board's suggestion, it would be highly inappropriate for the Court to decide the issue presented solely in the context of the petition filed by New Process Steel. The Board is not merely asking that the Seventh Circuit's decision in *New Process Steel* be affirmed. It is asking this Court to reverse the D.C. Circuit's decision in *Laurel Baye Healthcare*. Respondent is the party who obtained the decision in *Laurel Baye* and it has a substantial interest in defending and preserving that decision. Respondent desires the opportunity to participate fully as a party in interest in the case if the Court decides to take up the issue presented. The Court should not consider the Board's request to reverse *Laurel Baye* without active participation by Respondent.

Consolidation of cases presenting the same issue is not unusual. *E.g., Employment Division, Department of Human Resources v. Smith,* 485 U.S. 660, 663, n. 4 (1988) ("Raising identical legal issues and presenting almost identical facts, these two cases proceeded in tandem through state administrative proceedings and through the state courts. They were consolidated upon order of this Court when the State's petitions for certiorari were granted); *Traynor v. Turnage,* 480 U.S. 916 (1987) (granting and consolidating petitions for writ of certiorari to the Second and District of Columbia Circuits); *Commissioner of Internal Revenue*

v. Engle, 459 U.S. 722 (1983) (consolidating separate petitions for writs of certiorari to Seventh and Federal circuits).

The Board's petition in this case was filed the same day it responded to the petition in *New Process Steel*. The respective decisions of the District of Columbia and Seventh Circuits were issued on the same day. The analyses of the two courts are quite different, and the Court would be aided in its decision making process by having both cases briefed and argued together.

CONCLUSION

For the reasons stated herein, Respondent contends that the decision of the court of appeals should be affirmed, but does not oppose the granting of the petition given the sharp split among the circuits. Respondent affirmatively opposes deferral of any decision on the Board's petition. Respondent requests that the Court consider and either grant or deny the Board's petition. If the Court grants the petition of the Board in this case and of the employer in *New Process Steel*, the two cases should be consolidated for briefing and oral argument.

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(3)

No. 09-377

Supreme Court, U.S.
FILED
OCT 7 - 2009
OFFICE OF THE CLERK

IN THE
Supreme Court of the United States

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

LAUREL BAYE HEALTHCARE OF LAKE LANIER, Inc.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, LOCAL 1996

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United Food and Commercial Workers International Union, Local 1996 – the charging party before the National Labor Relations Board and the intervenor in the Court of Appeals – files this brief in support of the petition for a writ of certiorari.

STATEMENT

In the decision below, the District of Columbia Circuit held that "the power of the [National Labor Relations] Board to act exists [only] when the Board consists of three members" so that "the Board's ability to legally transact business" as well as any previously "delegated power to act . . . ceases when the Board's membership dips below the Board quorum of three members." Pet. App. 12a-13a. The Court of Appeals recognized that the consequence of this reading of the National Labor Relations Act is that "the Board's adjudicatory wheels grind to a halt" whenever the agency has fewer than three sitting mem-

bers. *Id.* at 14a. The circumstances of this case – which are typical of the hundreds of unfair labor practice cases decided by the NLRB since the end of 2007 when it was reduced to two members – demonstrate that this reading of the Act generates results that are not, as the court below put it, merely "inconvenient," *ibid.*, but are seriously detrimental to achieving the statutory purpose of minimizing "industrial strife" "by encouraging the practice and procedure of collective bargaining," 29 U.S.C. § 151.

The instant unfair labor practice case arose in the wake of a representation election conducted by the National Labor Relations Board on November 26, 2004 at a nursing care facility in Buford, Georgia operated by Laurel Baye Healthcare of Lake Lanier, Inc. *Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB*, 209 Fed. Appx. 345, 347 (4th Cir. 2006). In that election, the nursing home employees voted by a four-to-one margin to designate United Food and Commercial Workers Local 1996 as their collective bargaining representative. *Ibid.* Despite the overwhelming margin of the vote for union representation, Laurel Bay refused to recognize Local 1996 on grounds that the Fourth Circuit, in its decision enforcing the Board's bargaining order, characterized as "woefully insufficient." *Id.* at 351.

Immediately following the election, Laurel Baye unilaterally changed the Buford employees' health insurance plan, dress code, attendance policy and vacation pay. These unilateral changes generated a second NLRB case – the instant case – and on February 29, 2008, the Board ordered Laurel Baye to, "upon the request of the Union, rescind [the] unilaterally implemented changes" and to "make bargaining unit employees whole for any losses suffered as a result of those unilateral changes, with interest."

Pet. App. 28a.

Laurel Baye refused to take either of these actions and instead challenged the Board's order in the D.C. Circuit solely on the ground that it was issued at a time when the Board had only two members. The District of Columbia Circuit refused to enforce the Board's order on the grounds that the NLRB was "not properly constituted" because it had fewer than three members and that the remaining members of the group – to which the full Board had previously delegated its authority – therefore "did not have authority to issue the order" in this case. Pet. App. 14a.

Laurel Baye's legal maneuverings have rendered void the 2004 representation election and the 2005 Fourth Circuit enforcement of the NLRB's bargaining order. The changes in health insurance benefits unilaterally implemented by the Company soon after the 2004 election increased the cost of insurance to each employee by approximately $50.00 per pay period – an amount equal to five time the hourly wage of most bargaining unit members at the time. Laurel Baye's refusal to comply with the Board's order to "rescind [the] unilaterally implemented changes" and "make bargaining unit employees whole for any losses suffered as a result of those unilateral changes," Pet. App. 28a, has made it impossible for the parties to effectively negotiate over the important issue of employee health insurance. And, the parties' inability to resolve this key issue has prevented them from reaching an overall agreement.

ARGUMENT

The certiorari petition presents a question of great practical importance concerning the National Labor Relations Board's authority to administer and enforce the National Labor Relations Act. The D.C. Circuit's holding that the NLRB loses all authority to

administer and enforce the Act – including authority that had been previously delegated in a manner expressly contemplated by the statute – during periods in which the agency has fewer than three sitting members conflicts directing with the holding of the First, Second and Seventh Circuits that NLRB authority that has been properly delegated does not lapse during that period. *Snell Island SNF, LLC v. NLRB*, 568 F.3d 410, 419-24 (2d Cir. 2009), cert. pet. pending, No. 09-328; *New Process Steel, L.P. v. NLRB*, 564 F.3d 840, 845-48 (7th Cir. 2009), cert. pet. pending, No. 08-1457; *Northeastern Land Services, Ltd. v. NLRB*, 560 F.3d 36, 40-42(1st Cir. 2009), cert. pet. pending No. 09-213.

The D.C. Circuit has jurisdiction to review any decision of the NLRB, no matter where the case originates or where the parties reside. 29 U.S.C. § 160(f). Thus, the fact that the D.C. Circuit has reached a conclusion opposite to that reached by every other circuit that has considered the question creates a circuit conflict that cries out for resolution by this Court.

A. The NLRB has interpreted NLRA § 3(b) to mean that once the full Board, acting with the participation of at least three of its members, has "delegate[d] to any group of three . . . members any or all of the powers which it may itself exercise" – "two members . . . of any group [so] designated" may exercise those delegated powers during a period when the Board has three vacancies, because the statute expressly provides that "[a] vacancy on the Board shall not impair the right of th[ose] remaining members to exercise all of the powers of the Board." *See* Pet. App. 24a n. 4. As we briefly show here, the Seventh Circuit was clearly correct in concluding that "[t]he plain meaning of the statute . . . supports the NLRB's

delegation procedure" at issue in this case. *New Process Steel*, 564 F.3d at 846.

Section 3(b) of the National Labor Relations Act provides:

> "The Board is authorized to delegate to any group of three or more members any or all of the powers which it may itself exercise. * * * A vacancy in the Board shall not impair the right of the remaining members to exercise all of the powers of the Board, and three members of the Board shall, at all times, constitute a quorum of the Board, except that two members shall constitute a quorum of any group designated pursuant to the first sentence hereof." 29 U.S.C. § 153(b).

The first sentence of NLRA § 3(b) states the Board's authority to delegate its powers to groups of its members:

> "The Board is authorized to delegate to any group of three or more members any or all of the powers which it may itself exercise."

By specifying that the Board may delegate "any or *all* of the powers which it may itself exercise," the delegation provision makes particularly clear that the NLRB may delegate its full authority to a group of three or more Board members.

The third sentence of NLRA § 3(b) provides that a vacancy on the Board will not impair the right of the remaining members to exercise the Board's powers and defines what will constitute a quorum for the full Board and for designated groups of Board members:

> "A vacancy in the Board shall not impair the right of the remaining members to exercise all of the powers of the Board, and three members of the Board shall, at all times, constitute a quorum of the Board, except that two members shall constitute a

quorum of any group designated pursuant to the first sentence "

The first clause of this sentence (the vacancy provision) serves to confirm that a vacancy on the Board will not impair the right of the remaining members to exercise all of the Board's powers, including the right to exercise those powers that have been delegated to a designated group of Board members.

The quorum provisions that follow are joined to the vacancy provision with an "and" to make clear that no matter how many of the Board's five seats are vacant, three members will constitute a quorum of the Board and two members will constitute a quorum of a designated group of members to which Board powers have been delegated. Thus, the quorum provisions state two quorum definitions – three members for the full Board and two members for a designated group of Board members – and does so in a way that makes it clear that each definition is distinct and independent of the other by using the phrase "except that" to separate the definition of a designated group quorum from the definition of a Board quorum.

The sum of the matter is this: The full Board may delegate "any or all of the powers which it may exercise" to "any group of three or more members." "A vacancy in the Board shall not impair the right of the remaining members to exercise all of the powers of the Board," including the right to exercise all of the powers delegated to the remaining members as part of a designated group of members. And, notwithstanding that three members constitutes a quorum of the full Board, two members constitute a quorum of any designated group of members to which the Board has delegated its powers. Thus, as the NLRB and the First, Second and Seventh Circuits have concluded, the text of NLRA § 3(b) expressly provides

that, where the Board has delegated all its power to a designated three-member group and later vacancies reduce the Board's complement to two of the three members of that group, those remaining members constitute a quorum of the group with the right unimpeded by the vacancies to exercise all of the delegated power of the Board.

B. The D.C. Circuit's contrary construction of NLRA § 3(b) rests on multiple errors in its reading of the phrase in the third sentence of section 3(b) that "three members shall, at all times, constitute a quorum of the Board," 29 U.S.C. § 153(b), as a "requirement that the Board quorum requirement must be satisfied '*at all times*,'" Pet. App. at 6a (emphasis in original). The court below began by recognizing that "a three-member Board may delegate its powers to a three-member group, and this delegee group may act with two members" but then undermined that recognition by adding that the delegee group may exercise its powers only "so long as the Board quorum requirement is, 'at all times,' satisfied" by the Board having at least three sitting members. Pet. App. 7a.

First of all, the D.C. Circuit's reading improperly transforms the statute's definition of what constitutes a Board quorum into a minimum membership requirement that must be satisfied at all times for any powers of the Board – including those powers that the Board has delegated to a designated group of members – to be exercised.

A quorum definition does not, however, state a minimum membership requirement. Rather, a quorum is "the minimum number of members (usu[ally] a majority of all members) who must be present for a deliberative assembly to legally transact business." *Black's Law Dictionary* 1370 (9th ed. 2009). "The purpose of a quorum requirement is to insure that a

certain number of persons shall convene and transact the business at hand." *Gardner v. Applied Geographics, Inc.*, 18 Mass. L. Rep. 33, 2004 WL 1588115, at *4 (Mass. Super. Ct. 2004).

Given the meaning of the term "quorum," the D.C. Circuit could not be more wrong in its assertion that "the Board and delegee group quorum requirements are not mutually exclusive." Pet. App. 6a. The question of whether the Board has a quorum only arises when the full Board undertakes to transact business. But with respect to the exercise of powers that have been delegated to a group of Board members, it is the designated group and not the full Board that is transacting business. Thus, with respect to any particular piece of business there will never be an occasion for both the Board and the group quorum definitions to apply, because it will either be the full Board or the designated group – but not both – that is transacting the business in question. This common sense point is reflected in the fact that the full Board quorum definition and the group quorum definition are separated by the phrase "except that," which clearly indicates that the group quorum definition is an exception to the Board quorum definition.

The D.C. Circuit's reliance on the phrase "at all times" in § 3 (b) as a means for transforming the definition of a Board quorum into a minimum membership requirement is misplaced. For the Court of Appeals took that phrase entirely out of its statutory context. The relevant statutory context is this:

> "A vacancy in the Board shall not impair the right of the remaining members to exercise all of the powers of the Board, and three members of the Board shall, at all times, constitute a quorum of the Board, ..."

The principal meaning of the word "constitute" is "to make up." *Webster's II; New College Dictionary* 241 (1999). That is obviously the sense in which that word is used in the third sentence of NLRA § 3(b). The quorum clause is joined to the vacancy clause by the conjunction "and" in order to establish that no matter how many Board vacancies there may be, three members "shall, at all times, constitute a quorum." Without this specification, the normal understanding would be that a simple majority of the sitting Board members constitutes a quorum. *See* Pet. App. 8a ("Quorums . . . are usually majorities."). Thus, the point of the specification that "three members of the Board shall, at all times, constitute a quorum" is that, regardless of how many Board seats are filled, it takes three Board members to make up a quorum of the full Board. The statutory language most certainly does *not*, as the D.C. Circuit would have it, "impose[] a requirement for a three-member quorum 'at all times'" in the sense that the Board must be populated by three sitting members "at all times" in order for a designated group of Board members to exercise delegated Board powers.

CONCLUSION

The petition for a writ of certiorari should be granted and the decision of the D.C. Circuit should be reversed.

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FILED
OCT 16 2009
OFFICE OF THE CLERK

(4)

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v.

LAUREL BAYE HEALTHCARE OF LAKE LANIER, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR PETITIONER

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The court of appeals held that the two sitting members of the five-member National Labor Relations Board (Board) may not exercise the powers that were properly delegated to them as part of a three-member group. That holding is contrary to 29 U.S.C. 153(b), which provides that the Board may delegate "any or all" of its powers to a three-member group, and that "two members shall constitute a quorum" of such a group.

The court of appeals' decision conflicts with decisions of three other courts of appeals, all of which have held that the remaining two members constitute a valid quorum of the three-member delegee group and may continue to exercise the full Board powers delegated to the group. *New Process Steel, LP* v. *NLRB*, 564 F.3d 840 (7th Cir. 2009), petition for cert. pending, No. 08-1457 (filed May 22, 2009) (*New Process*); *Snell Island SNF*

LLC v. *NLRB*, 568 F.3d 410 (2d Cir. 2009), petition for cert. pending, No. 09-328 (filed Sept. 11, 2009); *Northeastern Land Servs., Ltd.* v. *NLRB*, 560 F.3d 36 (1st Cir. 2009), petition for cert. pending, No. 09-213 (filed Aug. 18, 2009). The certiorari petition was filed in *New Process* (No. 08-1457) prior to the filing of the petition in this case. On the same day the Solicitor General filed the certiorari petition on behalf of the Board in this case, she also filed a response on behalf of the Board in *New Process*, agreeing that the Court should grant the petition in *New Process* to resolve this important issue. The Solicitor General suggested that the Court hold the petition in this case pending resolution of *New Process*.

Respondent Laurel Baye Healthcare of Lake Lanier agrees with the Board that the question presented in this case and in *New Process* is an important and recurring question about which the courts of appeals are divided. Respondent also agrees with the Board that the Court should grant the certiorari petition in *New Process*. Respondent disagrees, however, with the Board's suggestion that the Court hold the petition in this case pending resolution of *New Process*, arguing that respondent should be permitted to defend the judgment below as a full party and describing different analyses employed by the various courts of appeals in the cases addressing the question presented.

From the government's perspective, the most important point is that the Court should resolve the important and recurring issue concerning the validity of actions taken by the two-member quorum of the group to which the Board delegated its powers. The Court could do so by granting the petition in either this case or in *New Process*. The government does not believe, however, that it is necessary for the Court to grant the petitions

in both cases in order to resolve the issue, any more than it is necessary to grant the two other pending certiorari petitions that also present the same question.

Respondent Laurel Baye Healthcare is correct that the various courts of appeals to have considered this question have relied on somewhat different reasoning in reaching their conclusions. But the ultimate question presented in each case is the same. This Court reviews judgments, not the reasoning behind the judgments, see, *e.g.*, *Rutan* v. *Republican Party*, 497 U.S. 62, 76 (1990) ("[A]lthough we affirm the Seventh Circuit's judgment * * * , we do not adopt the Seventh Circuit's reasoning."); *Smith* v. *Phillips*, 455 U.S. 209, 215 n.6 (1982) ("Respondent may, of course, defend the judgment below on any ground which the law and the record permit, provided the asserted ground would not expand the relief which has been granted."), and each court of appeals passed judgment on the same issue. If the Court grants certiorari in only one case, the private parties in the other pending cases may participate on the merits as amicus curiae to the same extent any other affected or interested party may.

That said, the government of course does not oppose the granting of its own petition in this case in addition to or in lieu of granting the petition in *New Process*, if the Court concludes that doing so would facilitate its consideration of the question presented.

* * * * *

For the foregoing reasons, and those stated in the petition for a writ of certiorari, the petition should be held pending the Court's disposition of *New Process Steel, LP* v. *NLRB*, No. 08-1457 (filed May 22, 2009), and then should be disposed of accordingly. In the alternative, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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OCTOBER 2009